ECORD
AND
BRIEFS

No. 15-1248

IN THE

Supreme Court of the United States

MCLANE COMPANY, INC.,

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONER

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BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONER

The Equal Employment Advisory Council respectfully submits this brief *amicus curiae* in support of the Petition for a Writ of Certiorari.[1]

[1] Counsel of record for all parties received notice at least 10 days prior to the due date of the *amicus curiae*'s intention to file this brief. Both parties have consented to the filing of this brief. Counsel for *amicus curiae* authored this brief in its entirety. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

INTEREST OF THE *AMICUS CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of discriminatory employment practices. Its membership includes over 250 major U.S. corporations, collectively providing employment to millions of workers. EEAC's directors and officers include many of the nation's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC a unique depth of understanding of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

All of EEAC's member companies are employers subject to Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.*, as amended, and other federal employment-related laws enforced by the U.S. Equal Employment Opportunity Commission (EEOC). As employers, and as potential targets of EEOC discrimination charge investigations and enforcement actions, EEAC's members have a substantial interest in the issue presented in this matter concerning the authority of the EEOC to compel the production of evidence that is irrelevant to resolution of the specific charge under investigation.

Because of its interest in the application of the nation's fair employment laws, EEAC has filed numerous briefs as *amicus curiae* in cases before this Court and the courts of appeals involving the proper

construction and interpretation of Title VII and other federal laws.[2]

EEAC seeks to assist the Court by highlighting the impact its decision may have beyond the immediate concerns of the parties to the case. Accordingly, this brief brings to the attention of the Court relevant information that has not already been brought to its attention by the parties. Because of its experience in these matters, EEAC is well-situated to brief the Court on the relevant concerns of the business community and the significance of this case to employers.

STATEMENT OF THE CASE

Petitioner McLane Company (McLane) administers a physical capability test to all new hires, as well as to current employees returning from medical leaves of absence. Pet. App. 3. Damiana Ochoa was required to take the test before being allowed to return to work from maternity leave. *Id.* She took and failed the test three times, and therefore was not permitted to return to work. *Id.*

Ochoa subsequently filed an administrative charge with Respondent EEOC, alleging that use of the test discriminated against her on the basis of sex (pregnancy) in violation of Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.*, as amended. Pet. App. 2.

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[2] *See, e.g., EEOC v. Shell Oil Co.*, 466 U.S. 54 (1984); *Mach Mining, LLC v. EEOC*, 135 S.Ct. 1645 (2015); *Gross v. FBL Fin. Svcs., Inc.*, 557 U.S. 167 (2009); *Burlington Northern & Santa Fe Rwy. v. White*, 548 U.S. 53 (2006); *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003).

As part of its investigation of the Ochoa charge, the EEOC asked McLane to provide extensive information about the test, including, for each person who took it:

- name, sex, date of birth, social security number, and contact information;
- disability status;
- the reason why he or she was required to take the test;
- test score; and
- reason for termination, if applicable.

Pet. App. 3-4, 20-21. The EEOC's request for information was not limited to the McLane facility where Ochoa worked, but rather extended to all McLane facilities nationwide. *Id.*

McLane challenged the breadth and scope of the information request. The EEOC responded by issuing a subpoena, in response to which McLane provided a database of all individuals who took the test nationwide by sex, location, position, test date, reason for the test, score, and (for applicants) whether the test taker was deemed minimally qualified for the position. *Id.* Dissatisfied, the EEOC filed an action in the U.S. District Court for the District of Arizona to enforce the subpoena.

In opposition, McLane argued that the EEOC was not entitled to any disability-related information, because Ochoa does not claim either to be disabled or that she was discriminated against because of actual or perceived disability. Pet. App. 23-26. It also contended that the additional "pedigree" information sought by the EEOC, including (among other data) name, date of birth, social security number, last known address, and phone number, was not relevant

to whether or not use of the test discriminated against Ochoa because of her pregnancy. Pet. App. 20-21. Finally, McLane argued that the information pertaining to the "reason for termination" for all those who took the test was overly broad and unduly burdensome. *Id.*

The district court refused the EEOC access to the disability-related information on the ground that Ochoa could not state a claim for disability discrimination. Pet. App. 25-27. The district court also found that the additional pedigree information sought in this case – in particular, the names, contact information, and social security numbers of individual employees – was not relevant to resolution of the Ochoa charge:

> [A]n individual's name, or even an interview he or she could provide if contacted, simply could not "shed light on" whether the [test] represents a tool of gender discrimination in the aggregate. The EEOC has provided nothing to the Court to allay the concerns raised by McLane that such data has been requested as a means of trolling for possible complainants.

Pet. App. 29. The district court also declined to require McLane to produce the "reason for termination" information. Pet. App. 30-31.

The EEOC appealed the district court's order denying enforcement of its subpoena for pedigree and termination information, but only as to the sex discrimination claims. Pet. App. 1, 5. It abandoned the argument that the subpoena should be enforced because of its purported relevance to suspected disability discrimination. Pet. App. 5-6.

The Ninth Circuit reversed the district court, enforcing the EEOC's subpoena for nationwide pedigree information. Pet. App. 15-16. It reasoned that the information was relevant because it would allow the EEOC to identify and contact other test takers who might have information casting light on Ochoa's allegations against McLane. Pet. App. 10-14. It also ruled that information concerning McLane's termination of other test takers was relevant, but remanded on the issue of whether requiring production of such information would be unduly burdensome. Pet. App. 14-16.

After its request for rehearing *en banc* was denied, McLane filed a Petition for a Writ of Certiorari with this Court on April 4, 2016.

SUMMARY OF REASONS FOR GRANTING THE WRIT

The decision below, which rubber-stamped an overbroad administrative subpoena for nationwide data having no relevance to the allegations of the EEOC discrimination charge being investigated, is contrary to Title VII's plain text and this Court's holding and rationale in *EEOC v. Shell Oil Co.*, 466 U.S. 54 (1984), and is inconsistent with interpretations of at least three federal courts of appeals. The lower court's misapplication of Title VII, as construed in *Shell*, will have an immediate and widespread effect on the conduct of EEOC charge investigation activities nationwide, to the profound disadvantage of employers and employees alike. Accordingly, this Court should grant the petition and reverse the decision below.

The relevance of an EEOC inquiry must be inextricably tied to the harm allegedly suffered by the

individual charge-filer. This interpretation is most consistent with Title VII and its requirement that the charging party be personally aggrieved. 42 U.S.C. § 2000e-5. Permitting the EEOC to demand information pertaining to issues outside the scope of the underlying charge also would unfairly deprive employers – large and small – of the due process guarantees to which they are entitled. More importantly, however, unfocused efforts such as these do little, if anything, to satisfy the EEOC's obligations to individual charging parties whose claims are, for all intents and purposes, left to languish while the agency pursues bigger "fish."

Indeed, there has been a steady shift at the EEOC towards incentivizing staff to seek out claims with potentially broad-based, systemic implications, which serves only to increase the agency's use of fantastically broad and irrelevant investigative subpoenas, to the detriment of employer-respondents, as well as to individual charging parties.

Furthermore, allowing the EEOC to obtain overly broad and irrelevant employment data, which often contain highly sensitive information such as employee social security numbers, unnecessarily increases the risk that such information will become available to the public, either through the charging party or as a result of an unauthorized data breach. At a minimum, when the EEOC requests sensitive data, the relevance of and need for the information must be balanced against the harm that will be suffered if the information is disclosed. The Court should use this case as an opportunity to clarify the meaning of *Shell Oil* in light of the cybersecurity and data breach concerns that have become so prevalent in recent years.

REASONS FOR GRANTING THE WRIT

REVIEW OF THE DECISION BELOW IS NECESSARY TO PROVIDE CLARITY ON ISSUES OF SUBSTANTIAL IMPORTANCE TO THE EMPLOYER COMMUNITY

The EEOC is authorized by Congress to enforce Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.*, which prohibits discrimination against a covered individual "with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). Title VII sets forth "'an integrated, multistep enforcement procedure' that ... begins with the filing of a charge with the EEOC alleging that a given employer has engaged in an unlawful employment practice." *Shell Oil Co.*, 466 U.S. at 62 (quoting *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 359 (1977) (footnote omitted)); *see also EEOC v. Univ. of Pa.*, 493 U.S. 182, 190 (1990). Upon the filing of a charge, Title VII provides that the EEOC "shall make an investigation thereof ...." 42 U.S.C. § 2000e-5(b).

In conducting discrimination charge investigations, the EEOC does not possess unfettered discretion to seek out other forms of discrimination not alleged by the charging party and outside the scope of its reasonable investigation of the charging party's claims. To the contrary, its authority to compel the production of evidence is limited to materials "relevant" to the allegations in the charge. 42 U.S.C. § 2000e-8(a). Thus, "unlike other federal agencies that possess plenary authority to demand to see records relevant to matters within their jurisdiction, the EEOC is entitled ... access only to evidence '*relevant to*

the charge under investigation.'" Shell Oil Co., 466 U.S. at 64 (citation and footnote omitted) (emphasis added).

By enforcing a wildly overbroad administrative subpoena for nationwide data having no relevance to the allegations of the charge being investigated, the Ninth Circuit disregarded Title VII's plain text and contravened this Court's admonitions in *Shell Oil*. Accordingly, the petition should be granted and the decision below reversed.

A. The Ninth Circuit's Decision Below Is Contrary To Title VII's Plain Text And This Court's Decision In *EEOC v. Shell Oil*

The EEOC's investigative power derives from the charges that are filed with it. *Shell Oil Co.*, 466 U.S. at 64. As such, during an investigation, the EEOC is only entitled to evidence that is relevant to the issues raised in the underlying discrimination charge. 42 U.S.C. § 2000e-8. The applicable statutory authority provides:

> In connection with any investigation of a charge filed under section 706 [42 U.S.C. § 2000e-5], the Commission or its designated representative shall at all reasonable times have access to, for the purposes of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to unlawful employment practices covered by this [subchapter] *and is relevant to the charge under investigation.*

42 U.S.C. § 2000e-8(a) (emphasis added).

Thus, in vesting the EEOC with primary responsibility for enforcing Title VII, Congress unambiguously restricted the EEOC's subpoena power to inspecting and copying evidence relevant to the charge under investigation. *Id.* This "requirement of relevance, like the charge requirement itself, is designed to cabin the EEOC's authority and prevent 'fishing expeditions.'" *EEOC v. United Air Lines, Inc.*, 287 F.3d 643, 653 (7th Cir. 2002) (quoting *EEOC v. K-Mart Corp.*, 694 F.2d 1055, 1066 (6th Cir. 1982)). As this Court emphasized in *Shell Oil*, "Congress did not eliminate the relevance requirement, and we must be careful not to construe the regulation adopted by the EEOC governing what goes into a charge in a fashion that renders that requirement a nullity." 466 U.S. at 69.

In this case, the EEOC's subpoena extends well beyond the four corners of the Ochoa charge, seeking, among other things, personal pedigree information such as social security numbers and dates of birth about all McLane test takers nationwide. It contains no meaningful boundaries whatsoever and, if found to be valid and enforceable as written, essentially would authorize the agency to launch a full-scale, unconstrained audit of myriad employment practices affecting McLane employees generally.

When the EEOC exceeds its statutory authority by issuing subpoenas for information pertaining to matters outside the bounds of the allegations being investigated, it unilaterally dispenses with Title VII's statutory requirements, as explained by this Court in *Shell Oil*, and robs employers of the basic protections they afford. *EEOC v. Bailey Co.*, 563 F.2d 439, 450 (6th Cir. 1977). By permitting the EEOC, in seeking enforcement of its administrative subpoena, "merely

to allege that an employer has violated Title VII," *Shell Oil*, 466 U.S. at 72, the Ninth Circuit effectively has "render[ed] nugatory the statutory limitation of the Commission's investigative authority to materials 'relevant' to a charge," *id.*, and thereby has thwarted "Congress' desire to prevent the Commission from exercising unconstrained investigative authority ...." *Id.* at 65.

B. The Ninth Circuit's Ruling Is At Odds With Other Circuits That Have Interpreted *Shell Oil* As Limiting The Scope Of An EEOC Inquiry To Matters Relevant To The Specific Charge Being Investigated

The Ninth Circuit's decision below also is at odds with other courts that have addressed this issue. In *EEOC v. Southern Farm Bureau Casualty Insurance Co.*, for instance, the Fifth Circuit refused to enforce an EEOC subpoena seeking information concerning *gender* in connection with the investigation of a *race* discrimination charge. 271 F.3d 209, 211-12 (5th Cir. 2001). The court observed that the EEOC's authority to demand information is not unlimited, but rather must be based on the specific claims raised in a valid charge. *Id. See also EEOC v. Kronos, Inc.*, 620 F.3d 287, 300-02 (3d Cir. 2010) (inquiry into potential race discrimination is not a reasonable expansion of a disability discrimination charge); *EEOC v. Royal Caribbean Cruises, Ltd.*, 771 F.3d 757, 761 (11th Cir. 2014) (affirming lower court's decision not to enforce EEOC subpoena where information sought in subpoena, which pertained to employees and applicants across the globe, would not aid the EEOC in resolving the disputed issues in the specific charge being investigated); *EEOC v. United Air Lines, Inc.*, 287 F.3d 643,

655 (7th Cir. 2002) (refusing to enforce portions of subpoena that sought information unrelated to charge of discrimination because "[a]llowing the EEOC to conduct such a broad investigation would require [the court] to disregard the Congressional requirement that the investigation be based on the charge").

Even the EEOC's own *Compliance Manual* counsels investigators against collecting irrelevant information and data exceeding the scope of the charging party's allegations, instructing them, for example, to collect only evidence that is both "material to the charge" and "relevant to the issue(s) raised in the charge." EEOC Compl. Man., Section 602: Evidence, § 602.4 Quality of Evidence, 2006 WL 4672676 (Aug. 2009). Evidence is *material*, the agency explains, "when it relates to one or more of the issues raised by a charge ... or by a respondent's answer to it." *Id.* at § 602.4(a) *Material evidence*. Evidence is *relevant* "if it tends to prove or disprove [a material] issue raised by a charge." *Id.* at § 602.4(b) *Relevant evidence*.

Accordingly, the manual explains that where the charging party alleges that the employer denied "training, assignments, pay increases, retention rights, transfer, and promotion ... to laid off employees eligible to retire but made available to younger employees," material evidence would include "information on [the charging party] and his/her performance; information on the ages, positions, and performance of laid off employees, remaining employees, and recalled employees; copies of company benefit plans and policy statements; any actuarial data used to support benefit reductions; and testimony" but would *not* include "[v]oluminous data ... which has nothing to do with [the] employment practices [being] investigated ...." *Id.* at § 602.4(a) *Example 2*.

The subpoena at issue here seeks a variety of information and documents pertaining to personally identifiable and other information for all McLane employees who took the physical capability test, including dates of birth, social security numbers, dates of application, and dates of hire. These data will do nothing to shed light upon Ochoa's Title VII pregnancy discrimination claim, however, and should be held beyond the agency's investigative reach.

Allowing the EEOC to seek out information pertaining to issues outside the scope of the charge being investigated would discourage employers from providing thorough and comprehensive responses for fear that such information likely would trigger an "expanded" investigation. At worst, such a practice could lead employers to refuse to provide *any* information requested in connection with a charge investigation, thereby forcing the EEOC each time to go through the time-consuming and tedious process of attempting to compel production of the data it seeks.

C. The Decision Below Increases Significantly The Risk Of Disclosure Of Confidential Information And Resulting Irreparable Harm To Employers And Employees

Most companies understandably are reluctant to hand over to the EEOC voluminous, confidential business and employee information that has no relevance to resolution of issues raised in a pending charge of discrimination. There are many reasons for this reluctance, including the fear that the information may be given to the charging party (perhaps a former employee with an axe to grind) and/or become the casualty of a data breach. Allowing the EEOC to

obtain broad categories of sensitive employment data that are not carefully tailored to elucidate allegations raised in the specific charge being investigated unnecessarily increases the risk that confidential employer and employee information will become available to a competitor or to the public. Because *Shell Oil* was decided at a time when cybersecurity and data breach concerns were nonexistent, this Court should use this case as an opportunity to provide much needed clarity as to its meaning in this context.

EEOC investigators *routinely* exceed their authority by asking employers to hand over confidential and sometimes highly sensitive business and employee information during charge investigations, even when the information has no relevance to the underlying charge. Disclosure of only marginally relevant employee data increases the risk that such information will be disclosed to the charging parties or worse, accessed by criminals through an unauthorized data breach.

Depending on the case, the EEOC might demand that an employer provide information relating to recruitment, hiring and promotional practices, workplace policy and procedure, organizational structure and succession planning, compensation and benefits, as well as many other employment-related practices that in one way or another shed light on the company's structure and operations. EEOC Compl. Man., Section 26: Selection and Analysis of Evidence, § 26.9 Records Maintained by Employers, 2006 WL 4673119 (Aug. 2009); *see also EEOC v. Ford Motor Credit Co.*, 26 F.3d 44 (6th Cir. 1994) (EEOC seeking detailed employment data for all workers employed at respondent's facility for a period of twelve years, including job titles, starting grade level and salary, assignments

and promotions). Moreover, the agency can (and frequently does) require unrestricted access to electronic payroll, accounting, and human resource data relating to specific individuals, entire business units and work facilities—often, as here, on a company-wide basis. EEOC Compl. Man., Section 26: Selection and Analysis of Evidence, § 26.3 Selection of Records, 2006 WL 4673113 (Aug. 2009); *see also EEOC v. Technocrest Sys., Inc.*, 448 F.3d 1035, 1037 (8th Cir. 2006) (EEOC requesting "the complete contents of all personnel files and records" for all technical employees of the company). These broad requests for data also can seek sensitive personal information, including employee social security numbers and other pedigree information.

Once this information is given to the EEOC, it becomes part of the investigative file and is subject to disclosure under the agency's disclosure rules, which means that in certain circumstances it can be viewed by the charging party or witnesses. The EEOC discloses information from case files pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. §§ 552 *et seq.*, and Section 83 of the EEOC's Compliance Manual. *See* EEOC Compl. Man., Section 83: Disclosure of Information in Charge Files (May 2016). And while the EEOC is only supposed to release non-confidential materials to the charging party, under a recently announced nationwide policy, the agency has indicated that it will unilaterally decide whether a document marked by an employer as "confidential" is sufficiently proprietary to justify withholding it from a charging party. *See* EEOC, *Effective Position Statements, available at* https://www.eeoc.gov/employers/position_statements.cfm. The EEOC has acknowledged that its investigators can

and routinely do share confidential business information supplied by employers with charging parties and witnesses in all types of cases as an "investigative technique" for the purpose of "elicit[ing] more information." *See Venetian Casino Resort, L.L.C. v. EEOC*, 409 F.3d 359, 362 (D.C. Cir. 2005). Turning over confidential employer information to an employee or former employee that may be seeking retribution carries significant risk.

Setting aside the dangers posed by providing confidential employer information to charging parties, there is also a very real concern today over electronic data breaches. Recent high-profile government agency data breaches highlight the risks of permitting the EEOC to maintain vast amounts of proprietary and sensitive information electronically.[3] Inadvertent disclosure of the sensitive and confidential information collected by the EEOC during its investigations would have predictably damaging (and often irreparably harmful) consequences. And the EEOC currently has no meaningful process in place to reasonably guard against the types of massive data breaches that have resulted in far reaching litigation and harm to a number of businesses.[4]

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[3] *See, e.g.*, Statement of OPM Press Secretary (Sept. 15, 2015), *available at* https://www.opm.gov/news/releases/2015/09/cyber-statement-923/ (last visited May 5, 2016) (reporting that a recent government data breach resulted in theft of personal information of 21.5 million individuals, including social security numbers and fingerprint data).

[4] Indeed, the EEOC's current written procedures do little to ensure protection of confidential information that is produced during investigations. *See, e.g.*, EEOC Compl. Man., Section 83: Disclosure of Information in Charge Files, § 83.6(a) (May 2016), *available at* https://www.eeoc.gov/eeoc/foia/section83.cfm:

With these risks of disclosure in mind, it is all the more important for the EEOC's investigative authority to be appropriately constrained. The EEOC's standard practice of requesting voluminous confidential and sensitive data that have no relevance to the charge under investigation unnecessarily increases the amount of information subject to harmful disclosure. Proper application of *Shell Oil* and the Title VII principles underlying it would minimize the risk of such threats.

D. The EEOC's Increasingly Aggressive Investigation And Enforcement Philosophy Reinforces The Need To Clarify The Limited Scope Of Its Subpoena Authority

The EEOC's disregard for the statutory constraints on its investigative and enforcement authority is well-documented, causing harm to employers as well as employees. If the decision below is permitted to stand, the EEOC undoubtedly will continue (even formalize) the practice of crafting vague and indefinite charges for the purpose of conducting unfettered "fishing expeditions" – in direct contravention of its statutory mandate. *See Shell Oil*, 466 U.S. at 90 ("Experience teaches that Government administrative agency investigations can be prone to abuse [and] are likely

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Security of Files, Copies Made by Others – Offices may require requesters to make special arrangements to have copies made by persons other than EEOC (or its contractor's) staff. Persons granted access to files are not normally permitted to remove files from EEOC's (or its contractor's) premises. District Directors or designees may allow a file to be copied away from the premises in unusual circumstances if proper safeguards are observed to prevent loss or mutilation of the file.

to be conducted more reasonably, more carefully, and more fairly, when the concerned parties are adequately notified of the causes of the investigation that are in progress") (O'Connor, J., concurring in part, dissenting in part).

Such a result would deny employers a meaningful opportunity to respond to charges and unfairly rob them of the "due process guaranties" to which they are entitled. *EEOC v. Bailey Co.*, 563 F.2d 439, 450 (6th Cir. 1977) (citation omitted).[5] This case thus presents the Court with an opportunity to clarify *Shell Oil* in light of the EEOC's recent, notoriously aggressive enforcement tactics which have become standard practice in recent years.

The EEOC holds a highly leveraged position over the employers it investigates, which is no surprise, given the "vast disparity of resources between the government and private litigants." *EEOC v. Great Steaks, Inc.*, 667 F.3d 510, 519 (4th Cir. 2012). As noted, the EEOC routinely capitalizes on its position of advantage by serving overly broad requests for information that are unconnected to the particular allegations of the charge under investigation. *See, e.g., Southern Farm Bureau*, 271 F.3d at 211-12; *Kronos,*

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[5] The EEOC has a variety of statutory tools at its disposal for the purpose of investigating and eradicating employment discrimination. The very purpose of a Commissioner charge, for example, is to enable the agency to investigate possible discrimination in situations where either no individual charge has been filed or where discrimination is believed to be "more widespread than the specific allegations made by an individual charge." Donald R. Livingston, *EEOC Litigation and Charge Resolution* 243-44 (BNA 2005). The EEOC should not be permitted to circumvent the statute's requirement that it obtain a Commissioner charge where, as here, it otherwise lacks the authority to investigate allegations not contained in the charge.

620 F.3d at 300-02; *Royal Caribbean Cruises*, 771 F.3d at 761; *United Air Lines*, 287 F.3d at 655. An employer served with such a request often will find itself in an untenable position of either incurring substantial costs to produce the requested irrelevant information or incurring substantial costs to fight, just to risk losing and then being compelled to incur the costs to produce the documents anyway. While the EEOC often targets large companies, employers with as few as 15 employees are subject to the laws the EEOC enforces, and thus also are potential targets of these abusive information requests. In one case, the EEOC was criticized for its "highly inappropriate" and "dogged pursuit" of a small business whereby it sought extremely broad categories of documents that were unrelated to any aggrieved person's charge of discrimination. *EEOC v. HomeNurse, Inc.*, 2013 WL 5779046, *14 (N.D. Ga. Sept. 30, 2013). The district court refused to enforce the subpoena, concluding that the agency's actions in that case "constitute[d] a misuse of its authority." *Id.*

A number of courts have sanctioned the EEOC for prosecutorial abuses in similar contexts. *See, e.g. EEOC v. Freeman*, 778 F.3d 463, 472-73 (4th Cir. 2015); *EEOC v. Peoplemark, Inc.*, 732 F.3d 584, 616 (6th Cir. 2013); *EEOC v. TriCore Reference Labs.*, 493 F. App'x 955, 960-61 (10th Cir. 2012); *EEOC v. West Customer Management Group, LLC*, 2014 WL 4435980, at *1 (N.D. Fla. Sept. 8, 2014); *EEOC v. U.S. Steel Corp.*, 2013 WL 625315 (W.D. Pa. Feb. 20, 2013). The EEOC also has garnered considerable criticism from members of Congress, who have taken the agency to task for among other things "pursuing

many questionable cases through sometimes overly aggressive means."[6]

In recent years, the EEOC has put a high priority on pursuing systemic litigation where alleged discrimination has a potentially broad impact on an industry, profession, company or geographic area. In fact, the agency requires its field offices to ensure that a specific percentage of its lawsuits is systemic in nature. *See* EEOC, Fiscal Year 2015 Performance and Accountability Rep. 22 (Systemic Cases – Performance Measure 4).[7] These systemic case quotas serve to further encourage the EEOC to disregard the statutory limits on its investigative authority by demanding overly broad company-wide information that has no connection to the charge under investigation.

However, these self-imposed systemic case quotas have no statutory basis, and undermine effective enforcement of employment discrimination laws by diverting valuable resources away from investigations of ripe claims contained in a filed charge, and towards unbridled fishing expeditions in search of class-based, systemic claims. Indeed, "the [EEOC has] gone far afield of [its] critical task, allowing its massive backlog of unresolved cases to climb to more than 76,000, while pursuing cases where there is no complaint ...." Press Release, Sen. Lamar Alexander, *Appropriations*

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[6] *See EEOC: An Agency on the Wrong Track? Litigation Failures, Misfocused Priorities, and Lack of Transparency Raise Concerns About Important Anti-Discrimination Agency*, U.S. Sen. Comm. on Health, Educ., Labor and Pensions, Minority Staff Rep. 3 (Nov, 24, 2014), *available at* http://www.help.senate.gov/imo/media/doc/FINAL%20EEOC%20Report%20with%20Appendix.pdf (last visited May 5, 2016).

[7] *Available at* https://www.eeoc.gov/eeoc/plan/upload/2015par.pdf (last visited May 5, 2016).

Committee Advances Bill Directing EEOC to Focus on "Massive" Backlog of 76,000 Unresolved Workplace Discrimination Cases (Apr. 21, 2016).

CONCLUSION

For all of the foregoing reasons, the Equal Employment Advisory Council respectfully requests the Court grant the Petition for a Writ of Certiorari and reverse the decision below.

Respectfully submitted,

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